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Sent: Wednesday, December 03, 2014 2:17 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: National Lime Association Comments on Criteria and Procedures for Proposed Assessment of Civil Penalties: Proposed Rule (RIN 1219-AB72)
Attachments: NLA Comments on July 2014 penalty proposal final.docx

Attached please find the comments of the National Lime Association (NLA) on the Proposed Rule on Criteria and Procedures for Proposed Assessment of Civil Penalties (RIN 1219-AB72). Please let me know if you have any difficulties opening the document. Thanks.

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LIME
NATIONAL LIME ASSOCIATION

December 3, 2014

Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939

(Submitted electronically to
zzMSHA-Comments@dol.gov)

RE: Criteria and Procedures for Proposed Assessment of Civil Penalties: Proposed Rule (RIN 1219-AB72)

The National Lime Association (NLA) is pleased to present its comments on the Proposed Rule on Criteria and Procedures for Proposed Assessment of Civil Penalties.

NLA is the industry trade association for the manufacturers of high calcium quicklime and dolomitic quicklime (calcium oxide) and hydrated lime (calcium hydroxide), which are collectively and commonly referred to as "lime." Lime is used in a wide array of critical applications and industries, including for environmental control and protection, metallurgical, construction, chemical and food production. With plant operations located in 24 states, NLA's members produce greater than 99 percent of the United States' calcium oxides and hydroxides. Because NLA's members operate both surface and underground mines under the jurisdiction of MSHA, NLA and its members have a substantive interest in this rulemaking.

NLA's members are pledged to safety as a primary value of the lime industry, and NLA's Health and Safety Committee has worked with MSHA staff to improve the overall safety of the lime industry workforce. NLA stands ready to continue to work with MSHA as new rules and legislation are implemented.

NLA commends MSHA for the desire to improve the "consistency, objectivity and efficiency" of the assessment of civil penalties, and some of the proposed changes, in NLA's opinion, will serve those goals. However, as explained below, NLA believes that other changes will create, rather than mitigate, problems.

1. The Proposed Rule Is Likely To Increase Overall Penalties

The proposed rule preamble asserts that the overall penalties imposed under the revised rule will be similar to those imposed under the current rules, with some shifting of burden, primarily from less serious violations to more serious violations. NLA's reading of the rule suggests, however, that there are likely to be higher penalties for many violations under the revision, in particular because of the narrowing of the negligence tiers. The revision is also designed to make it much

more difficult to challenge citations, particularly if the issue is degree of negligence or gravity. MSHA is also proposing changes that would make it more difficult for an Administrative Law Judge or the Review Commission to reduce penalties imposed by MSHA.

2. NLA Supports Proposed Changes to the Impact of History of Previous Violations

The proposal would increase the impact of the history of previous violations, but it also proposes some relief from this element for smaller operations. Under the proposal, there would be no points added in this category for any mine with fewer than 10 inspection days or fewer than 10 violations in the 15 months prior to the violation.

NLA supports this proposed change, because it recognizes that small operations can be unduly impacted by relatively small changes in the numbers of cited violations.

3. MSHA Should Retain the Low Negligence Category

MSHA proposes increasing the impact of negligence on penalty amounts, as well as reducing the number of negligence categories from 5 to 3. The current categories are no negligence, low negligence, moderate negligence, high negligence, and reckless disregard. The revised categories would be not negligent, negligent, and reckless disregard.

NLA supports the concept of making degree of negligence a more important factor in setting penalties, and agrees that violations with high negligence should be more severely penalized. However, the proposed categories do not adequately achieve that goal.

NLA strongly opposes the elimination of the "low negligence" category. Since MSHA rarely, if ever, finds the absence of negligence, the proposed change will result in previously low negligence citations being characterized as negligent, with a higher point value. The points for "negligent" will be 15 (out of a possible 100), so this will be an even larger element in overall penalty calculation than the former "Moderate Negligence," which was 20 points (out of 208). Rather than simply shifting penalties to more serious violations, the change will largely result in substantially higher penalties for what would have been considered low negligence violations under the current rules.

The fact is that there are many violations that represent low negligence, as MSHA inspectors have been well aware for many years. These occur at even well-run operations, and were often candidates for the prior single penalty assessment. To treat these minor infractions as the same as those involving more serious negligence (short of "reckless disregard") is unfair, and does not constitute treating increased negligence as a serious matter.

For these reasons, the low negligence category should be retained.

Furthermore, if MSHA intends to maintain a "not negligent" category, such violations should be subject only to a nominal penalty (if any penalty at all), and should not be subject to any of the other elements that escalate penalties. MSHA defines "Not Negligent" as "The operator exercised diligence and could not have known of the violative condition or practice." No valid purpose is served by the imposition of substantial penalties in such a case.

4. The Definition of "Occurred" Should Not Be Expanded

In the proposed revisions of the likelihood categories, MSHA proposes that the most serious category, "occurred," would be defined to include not only injuries that occurred as a result of the violation, but also events that could have caused an injury. This is a substantial expansion of this definition, and injects additional vagueness and speculation into the decisionmaking process, since the assessor will have to determine not only the likelihood of the event, but the likelihood that it could have caused an injury—which confuses this category with severity. The current definition of "occurred," which clearly focuses on events that actually cause an injury, is clearer, and should be retained.

5. MSHA Should Restore The 30% Penalty Reduction For Good Faith Abatement

MSHA proposes a new 20% reduction in penalties if the mine operator agrees to pay the penalty without contesting the violation. This would be in addition to the current 10% reduction for prompt abatement. NLA questions the wisdom of penalizing persons who invoke their rights to challenge questionable citations.

A better choice would be to reinstate the 30% reduction for prompt abatement that existed before the last revision of the rule. Congress believed that this was an important criterion and explicitly directed MSHA to consider the operator's good faith "in attempting to achieve rapid compliance" in assessing penalties. There is no mention in that statutory language of reductions for waiving the right to review. Accordingly, NLA believes that it is inappropriate, and contrary to the expressed intention of Congress for MSHA to provide a substantially greater penalty reduction for review waiver than for good faith abatement. At the very least, the reduction for prompt abatement should be 20%, and that for review waiver 10%.

If MSHA decides to retain a reduction for waiver of review, it should make clear that the reduction will still be available if mine operators seek to conference citations with MSHA. Conferencing should be encouraged, not discouraged, as it gives both operators and MSHA an opportunity to work out disagreements and issues without the need for further review.

6. MSHA Should Not Seek to Restrict the Review Commission's Discretion

The proposed rule would bind the Review Commission to MSHA's numerical formula for calculating penalties. NLA understands that other commenters will strongly argue that MSHA lacks the statutory authority to restrict the Review Commission's authority in this way, and NLA agrees. The Review Commission is not part of MSHA, nor is it subject to MSHA rulemaking, since it is separately established under 30 U.S.C. Section 823. Nowhere in the statute is there any provision purporting to empower MSHA to limit the discretion of the Commission.

NLA's comments, however, will focus on why the specific proposal to limit the Review Commission's discretion is a bad idea, even if MSHA had the power to do it. As MSHA notes in the preamble, a substantial number of cases involving challenged citations end with reduced penalties (about a third, according to MSHA). 79 Fed. Reg. 44508. MSHA's error, however, lies in believing that this is a sign of inconsistency on the part of the Review Commission.

Rather, it is clear that if the impartial reviewers are routinely reducing MSHA penalties, it means that MSHA is over-penalizing, not that there is something wrong with the standards for review. Indeed, rather than a source of inconsistency on the part of the Commission, these decisions are a result of MSHA's inconsistency in imposing penalties. The number of reduced awards should be an incentive for MSHA to improve its penalty-setting procedures, as well as the training and performance review of its inspectors. MSHA should analyze the Commission decisions to identify those situations in which the Commission is most likely to reduce penalties, and develop an approach that assigns the appropriate penalty in the first place.

MSHA's proposal to restrict the Review Commission's discretion is particularly problematic when considered in conjunction with some of the other proposed changes, such the combining of low, moderate and high negligence violations into a single category. As noted above, this would result in over-penalizing minor violations—and the Review Commission's hands would be tied, even if the Commissioners believed that the resulting penalty was excessive. Such an approach would severely restrict a key element of the Review Commission's role, which is to prevent overreach by MSHA's enforcement operations.

MSHA should drop the proposed rules relating to the Review Commission.

NLA appreciates the opportunity to comment on these important issues.

Very truly yours,

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